CASE SCHEDULED FOR ORAL ARGUMENT ON JANUARY 14, 2019

No. 18-1151
(Consolidated with 18-1180)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC., ET AL.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Petition for Review from a Decision of
The National Labor Relations Board

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

GLOSSARY

"Petitioners" refers collectively to Murray American Energy, Inc., The Harrison County Coal Company, The Monongalia County Coal Company, The Marshall County Coal Company, and The Marion County Coal Company.[1]

"Harrison County Mine" means The Harrison County Coal Company.

"Mon County Mine" means The Monongalia County Coal Company.

"Marshall County Mine" means The Marshall County Coal Company.

"Marion County Mine" means The Marion County Coal Company.

"Murray" means Murray American Energy, Inc.

"Petitioners' Opening Brief" means Petitioners' Brief to the U.S. Court of Appeals for the D.C. Circuit, filed on September 4, 2018.

"ALJ" means administrative law judge.

"Judge Goldman" means Administrative Law Judge David I. Goldman.

"Decision and Order" or the "Decision" means the National Labor Relations Board's May 7, 2018 Decision and Order in *Murray American Energy, Inc. and the Harrison County Coal Company, a single employer, and United Mine Workers of America, District 31, Local 1501, AFL-CIO, CLC, Murray American Energy, Inc. and the Marion County Coal Company, a single employer, and United Mine Workers of America, District 31, Local 9909, AFL-CIO, CLC, Murray American Energy, Inc. and the Monongalia County Coal Company, a single employer, and United Mine Workers of America, AFL-CIO, CLC, and Murray American Energy, Inc. and the Marshall County Coal Company, a single employer, and United Mine Workers of America, District 31, AFL-CIO, CLC*, Case Nos. 06-CA-169736, 06-CA-170978, 06-CA-171057, 06-CA-171069, 06-CA-171085, 06-CA-174075, 06-

[1] Although the various unfair labor practice charges at issue were filed against the entity for which the respective charging party worked, throughout this brief, these entities will be referred to collectively as "Petitioners." When relevant, however, specific reference will be made to the appropriate employing entity.

CA-174080, 06-CA-174152, 06-CA-183054, 06-CA-185640 and 06-CA-186015, reported at 366 NLRB No. 80.

"NLRA" or the "Act" means the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq*.

"NLRB" or the "Board" means National Labor Relations Board.

"The General Counsel" means Counsel for the NLRB.

"The General Counsel's Response" means the General Counsel for the National Labor Relations Board's Brief to the U.S. Court of Appeals for the D.C. Circuit, filed on November 5, 2018.

The "Union" refers collectively to the United Mine Workers of America International Union, its District 31, and its Locals 1501 and 9909.

"MSHA" means the Mine Safety and Health Administration.

SUMMARY OF ARGUMENT

The General Counsel's brief is largely a reiteration of the NLRB's Decision and Order at issue in this case. In support of their various arguments that the determinations therein were warranted, the General Counsel relies on mischaracterizations of record evidence and applicable law. Ultimately, however, the General Counsel fails to sufficiently rebut Petitioners' position that the Board's determinations lack substantial evidentiary support or are contrary to Board precedent. As a result, the Court should grant Petitioners' Petition for Review and set aside those portions of the Order discussed in this Reply and Petitioners' Opening Brief.[2]

ARGUMENT

A. The General Counsel Mischaracterizes Record Evidence and Applicable Law and Fails to Establish the Board's Determination that Petitioners Engaged in Unlawful Surveillance Through Jeremy Devine is Consistent with Board Precedent

The General Counsel concedes in their brief that Devine's presence at the MSHA office on February 17, 2016 was "legitimate." (GC's Response, p. 37) However, according to the General Counsel, Devine's conduct crossed the line after his meeting, when he "chose to pause outside the conference room—where he

[2] Given the limitations on length and the purpose of reply briefs, Petitioners have tried to avoid reiterating arguments and rationale previously set forth in their Opening Brief and instead address only the most significant misstatements by the General Counsel of the record, the law, and Petitioners' arguments.

knew a meeting involving union representatives and employees was taking place—to observe more closely." (GC's Response, p. 37) This contention mischaracterizes record evidence and applicable law.

There is no evidence that Devine knew—at the moment he allegedly "paused" to observe the meeting—that it involved union representatives ***and employees***. Instead, Devine testified that prior to the start of his own meeting, he saw only union representatives and an MSHA representative—namely, Rick Rinehart, Mike Payton, and Jeff Maxwell.[3] (APP0498) Devine did not testify that he recognized or was aware any employee was present at the meeting and the Union did not present evidence to establish otherwise. Indeed, Judge Goldman acknowledged that Devine "observed from the reception area that ***union and MSHA officials***, and other individuals he could not see, were in a meeting." (APP0131) (emphasis added).

Further, the General Counsel's contention that Devine's alleged conduct following the end of his own meeting rendered him a "curious supervisor"[4] who

[3] Rinehart was the Union Chairman of the Safety Committee. (APP0283) Payton was the Union's international representative out of Region One. In that position, he served as a representative of locals in District 31 and District 2, which included but was not limited to employees at the Marshall County Mine, Marion County Mine, and Harrison County Mine. (APP0271-272) Maxwell, who interestingly did not testify, is an investigator with MSHA. (APP0275)

[4] The strained reasoning underlying Judge Goldman's conclusions and the General Counsel's arguments become plain when one considers that if Devine was in fact so "curious" about what was going on in the conference room, why would he not

took "steps out of the ordinary to investigate the previously overseen union activity in an effort to learn more about it" is undermined by the very Board precedent cited by the General Counsel. In *Control Bldg. Servs.*, 337 NLRB 844 (2002), the Board affirmed the ALJ's conclusion that managers engaged in unlawful surveillance because the credited evidence established that they stood outside the windows of a restaurant, where several union representatives were meeting with employees, ***for 10 to 15 minutes***. There, the ALJ explained that "[s]urveillance is not per se unlawful . . . Thus, had the managers come to see whether the employees were on duty and then left, I do not believe that would have constituted a violation. That would have taken a minute or two." *Id.* at 847. However, the managers' extended observation of 10 to 15 minutes did constitute unlawful surveillance. *Id.* at 848.

Here, even assuming that Devine "paused" outside of the conference room, the credited evidence does not indicate his observation lasted more than a minute or two. Based on precedent cited by the General Counsel, the minimal duration of the alleged observation weighs against a finding of unlawful surveillance. Moreover, the credited evidence does not establish any other indicia of coerciveness, including any finding that Devine engaged in other coercive behavior during his alleged observation. *See Aladdin Gaming, LLC*, 345 NLRB 585, 586

"peer" into the conference room when he first passed by, or, indeed, ask Rinehart about it while they were together.

(2005) ("Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.").

In short, the credited evidence simply does not prove that Devine took actions so out of the ordinary or otherwise coercive to support a finding of unlawful surveillance. Again, even assuming that Devine engaged in the alleged observation, his behavior is entirely different from the behavior described in previous Board decisions, including those cited by the General Counsel. *See, e.g.*, *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007) (reversing ALJ's dismissal of surveillance allegation where record showed administrator's actions were out of the ordinary in that she was present at the facility on a Saturday when she did not ordinarily work Saturdays and employee testimony indicated they had ***never*** seen her at the facility on a Saturday, she stood in the doorway and watched union activities and, by her own admission, was there solely for the purpose of observing union activity); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996) (affirming Board's finding that employer, through its security guards, engaged in unlawful surveillance based on "extensive testimony" by employees that they were observed "constantly and for extended periods of time").

Given the absence of evidence that Devine's conduct was of the type that would interfere with, restrain, or coerce employees in exercising their rights guaranteed under Section 7 of the Act, the Board's determination that he engaged in unlawful surveillance was unwarranted.

B. The General Counsel Fails to Establish that the Board Properly Applied the *Atlantic Steel* Factors in Determining Jamie Hayes Did Not Lose the Act's Protection

The General Counsel contends the Board "reasonably determined that Hayes retained the Act's protection even though he disrupted the safety meeting, and thus, that his discipline was unlawful." (GC's Response, p. 34) However, the General Counsel, like the Board, misapplies the *Atlantic Steel* factors and, thus, fails to establish the Board's determination was not arbitrary in this regard.

The General Counsel first asserts that the place of discussion favors protection because "[a]n employer who chooses, as the Company did, to broach a topic in a particular location, cannot claim that an employee's related protests should lose protection based on the setting." (GC's Response, p. 31) In support of this assertion, the General Counsel cites *Cibao Meat Prods.*, 338 NLRB 934 (2003). There, the Board cited the fact that an employee's statement occurred in a group employee meeting to explain why it was reasonable to infer a concerted objective even though the employee's statement focused on his own wages, hours, and terms and conditions of employment. *Id.* at 938. In *Cibao*, the Board did not,

as the General Counsel contends, articulate a sweeping standard under which an employer's decision to hold a meeting on a particular topic automatically results in the forfeiture of its ability to discipline employees for any conduct that occurs therein or to otherwise maintain order and respect.

The other decision cited by the General Counsel in support of this assertion is similarly inapposite. Indeed, in *N.L.R.B. v. Sw. Bell Tel. Co.*, 694 F.2d 974 (5th Cir. 1982), the record "clearly" showed that the supervisor "deliberately chose to begin [a] dispute in the workroom" by approaching the employee at his desk, which was in full view of the other employees. *Id.* at 978. Thus, "having chosen to argue in front of the other workers, the Company can hardly be heard to complain about the public nature of the . . . discussion." *Id.* In contrast, the record in this case does not "clearly" show that Jones or any other representative of the Petitioners "deliberately" chose to begin a dispute with Moore in the lamp room during the December 2015 safety meeting. To the contrary, Petitioners were simply trying to conduct a routine safety meeting when Hayes launched into a loud and belligerent rant directed at members of management.

The General Counsel also asserts the Board correctly determined that the nature of Hayes' outburst favors protection because he used no profanity, made no threats, and engaged in no physically menacing conduct. (GC's Response, p. 33) But, as outlined by Petitioners in their Opening Brief, the lack of such extreme

behavior is not determinative. (Petitioners' Br., p. 32) While the General Counsel claims the Board did not rely on any such rule, by agreeing that Hayes' conduct was "out of line" but determining it was protected because it was not "opprobrious," it appears the Board did in fact do just that. (APP0129)

Finally, the General Counsel contends that the fourth *Atlantic Steel* factor weighs strongly in favor of protection as Hayes' remarks and related conduct were "provoked by, and directly responsive to, an unfair labor practice, i.e., Jones' unlawful directive that employees not file official safety complaints." (GC's Response, p. 34) While an employer may not provoke an employee with unlawful conduct and rely on resulting insubordination to discipline the employee, Jones did not direct employees not to file official safety complaints[5] and Petitioners thus did not provoke Hayes' insubordination with unlawful conduct, or discipline him for his behavior.[6]

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[5] Petitioners maintain, for the reasons outlined in their Opening Brief, that the Board's determination that Jones directed employees not to file safety complaints with MSHA is not supported by substantial evidence and is instead drawn from unwarranted credibility assessments that ignore material evidence of record.

[6] The General Counsel asserts that Petitioners do not deny they "disciplined Hayes for his actions at the [December 2015] meeting." (GC's Response, p. 30) Such assertion is false and contrary to the record evidence. Petitioners, citing Hayes' own testimony, specifically denied that Hayes was disciplined during the December 2015 meeting, the meeting the following day, or at any other point. (Petitioners' Br., p. 11)

The General Counsel has failed to show that Judge Goldman's application of the *Atlantic Steel* factors (or the Board's affirmation thereof) was proper, and such determination should be reversed.

C. The General Counsel Fails to Cite to Substantial Evidence to Support the Board's Determination that Petitioners Unlawfully Threatened Joshua Preston

In response to Petitioners' argument concerning the lack of substantial evidence to support the Board's determination that Phillips' "smart-aleck" remark to Preston constituted an unlawful threat, the General Counsel claims such determination was "well supported." (GC's Response, p. 38) However, the General Counsel does nothing more than restate Judge Goldman's flawed credibility assessments and cites minimal evidence to support the Board's determination. (GC's Response, pp. 38-39)

The General Counsel contends the credited evidence supports the Board's "legal analysis"[7] that the remark constituted an unlawful threat. (GC's Response, p. 39) However, the Board's analysis largely parroted Judge Goldman's, which consisted solely of his characterization, without explanation, of the remark as an "unmistakable" and "naked" threat. (APP0116 n.3, APP0136) Neither Judge Goldman nor the Board cited evidence, relevant precedent, or otherwise articulated how Phillips' remark objectively tended to interfere with the free exercise of

[7] The General Counsel's use of this term to describe either Judge Goldman's or the Board's treatment of the allegation involving Preston is a stretch.

employee rights under the NLRA. The extent of the General Counsel's evidence and explanation is its characterization of the threat as "explicit" and the presence of two "high-level managers." (GC's Response, p. 39) However, such evidence is far from substantial and, critically, was not cited by Judge Goldman or the Board.

The Board decision cited by the General Counsel highlights the shortcomings of Judge Goldman's and the Board's legal analyses and the credited evidence. In *Chinese Daily News*, 346 NLRB 906 (2006), the Board affirmed an ALJ's finding that a statement intended as a joke constituted an unlawful threat. However, in that case, the ALJ engaged in the appropriate legal analysis in making such a determination. The ALJ stated that "[i]f the statement was made solemnly, there is no doubt it would be a bald threat and violate Section 8(a)(1) of the Act," but because the ALJ found the remark was intended as a joke, it was appropriate "to consider whether or not the remark under all the circumstances, from the employees' perspective and irrespective of the speaker's intent, reasonably could be expected to chill employees' Section 7 rights." *Id.* at 932.

The ALJ then explained how the facts presented demonstrated the remark did have such a reasonably likely effect and therefore violated the Act. Specifically, the facts showed that the employees at issue had opposed the promotion of another employee by submitting a signed petition and, after the petition was rejected and the employee was promoted, submitted a second petition

seeking the promotion be undone. *Id.* At that point, a management official stated that because of the employees' efforts, the employee would be promoted yet again to a higher petition. *Id.* Given these facts and circumstances, the ALJ found the remark would reasonably be taken with doubt and fear by the subordinate employees. *Id.*

Here, in contrast, Judge Goldman deemed the remark—which he conceded was intended as a joke—to be a threat without considering whether, under all of the circumstances, it would reasonably tend to chill Section 7 rights, and the Board affirmed. Indeed, while the General Counsel now cites the presence of two "high-level" managers, neither Judge Goldman nor the Board mentioned this evidence in their respective "analyses." The General Counsel's post-hoc rationalization fails to provide substantial support for the Board's determination. *See NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 444 (1965) (noting the integrity of the administration process requires that courts not accept appellate counsel's post hoc rationalizations for agency action as a reviewing court's substitution of counsel's rationale or discretion for that of the Board is incompatible with the orderly function of the process of judicial review).

D. The General Counsel Fails to Establish that Substantial Evidence Supports the Board's Determination that Petitioners' Discipline of Mark Moore was Unlawful

In support of its contention that substantial evidence supports the Board's finding that Moore's protected activity motivated Petitioners' decision to suspend him, the General Counsel first cites Petitioners' knowledge of Moore's intent to file a grievance and the Union's subsequent filing of a Board charge on his behalf. Contrary to the General Counsel's assertion, however, Koontz—who directed that Moore be suspended in September 2016—did not "clearly" admit that he was aware of Moore's earlier unlawful discipline and the Board charge based thereon. (GC's Response, p. 44) Rather, Koontz testified only that he was aware there was a "discussion" between Moore and Crowe. (APP0453) He testified he played no role in the earlier discipline and was on vacation when it occurred. (APP0453) Likewise, he indicated he had "very little" knowledge of the charge filed on Moore's behalf and again, no involvement with it. (APP0453) Moreover and critically, Koontz did not testify ***when*** he became aware of the earlier discipline or the Board charge and there is no evidence demonstrating that he knew of either at the time he issued discipline to Moore in September 2016. The General Counsel's characterization of Koontz's knowledge of Moore's protected activity is exaggerated and such limited knowledge, with no indication of when it was obtained, provides little, if any, support for the Board's determination.

See Avecor v. NLRB, 931 F.2d 924, 931 (D.C. Cir. 1991) (setting aside finding that an employee's discharge violated the Act as a discharge cannot stem from an improper motivation where the employer is ignorant of the employee's union activity, and noting that even in a tiny plant with strongly anti-union management, supervisors are not omniscient and the Board must establish by direct or circumstantial evidence that an employer had reason to notice union activity).

The General Counsel also cites the "suspect" timing of the September 2016 suspension. The General Counsel again mischaracterizes the record evidence in an effort to explain why the Board's finding in this regard should be enforced. According to the General Counsel, the suspension occurred "two months after the unlawful threat and suspension" and three weeks after the charge. (GC's Response, p. 42) In reality, however, the September 2016 suspension occurred three months after the earlier threat and suspension. The passage of three months between these two events is a considerable amount of time and is insufficient to support the Board's finding. With respect to the filing of the Board charge, the General Counsel reiterates Judge Goldman's unwarranted assumption that Petitioners "tolerated" Moore's tardiness until Koontz became aware the charge had been filed. (GC's Response, p. 44) Again, there is no actual evidence to indicate when Koontz became aware of the charge and, consequently, no

evidence to indicate such awareness coincided with his decision to discipline Moore in September 2016.

E. Petitioners' Responses to the Union's Various Requests for Information Were Not Unlawful

1. *The General Counsel Fails to Establish the Insufficiency of Mohan's Response to the Union's Vague and Excessively Overbroad Information Requests Concerning Subcontractors*

The General Counsel fails to establish how Mohan's response to Phillippi's vague and overbroad information requests concerning subcontractors was insufficient under the Act. As the General Counsel acknowledges, when an employer is faced with an ambiguous or overbroad request, it must seek an accommodation with the Union. (GC's Response, p. 53) The General Counsel inexplicably takes the position that Mohan's request to Phillippi to narrow his exceedingly broad requests down to a "specific date, grievant, contractor, project, etc.," fails to satisfy this burden. (GC's Response, p. 54) This position is nonsensical. Indeed, the General Counsel recognizes that the burden is on the employer to propose an alternative method of disclosing information because the employer is in the better position to propose how it can best respond. Mohan's proposal, which provided specific guidance to Phillippi on how he could narrow his requests ***to better enable Petitioners to respond***, does exactly that.

The General Counsel also contends that Mohan's response was insufficient because she failed to commit to comply with the Union's request even if the Union

provided more details. (GC's Response, p. 54 n.14) Such contention is again nonsensical and unavailing. Until Mohan understood what the Union was requesting, she could hardly commit to providing it.

By finding that Mohan's response was insufficient and failing to explain what more she could have done—short of providing responses to requests she did not understand—the Board improperly increases the burden of accommodation on employers and places employers in an untenable position.

2. *The General Counsel Fails to Establish that Petitioners' Delay in Providing Information Regarding the Bradford Plan Was Unreasonable*

Petitioners maintain that their delay in providing information concerning employees on the Bradford Plan as of January 2014 was not unreasonable under the circumstances. Mohan testified that the last time the Bradford Plan was administered at the Mon County Mine was "prior to the end of 2013, prior to [Murray's] acquisition of the [Mon County] mine." (APP0528-529) She further testified that she knew the Bradford Plan was not being administered in January 2014 because the spreadsheet regarding employees on the Bradford Plan (which is what was ultimately provided to the Union) had not been updated since October 2013. (APP0529) Judge Goldman's rejection of this testimony as false based on a single sentence in a memorandum regarding administration of the Bradford Plan was improper. (APP0142, APP0683-686) Indeed, no credible evidence

corroborated the information set forth in the memorandum. Put simply, Petitioners were unable to provide a list of employees on the Bradford Plan as of January 2014 because no such list existed. Punishing Petitioners for their inability to provide this specific information and for their corresponding delay in providing what information they could find does not effectuate the purposes of the Act.

The General Counsel also implies that Petitioners failed to conduct a reasonable search. As previously explained, however, Mohan searched for information about employees on the Bradford Plan as of January 2014 despite her understanding the Plan had not been administered after December 2013 and could not find any such information. (Petitioners' Br., pp. 52-53) Judge Goldman, the Board, and the General Counsel have failed to articulate why Mohan's search was not reasonable.

CONCLUSION

For all of the foregoing reasons as well as those presented in the Opening Brief, Petitioners request that the Court grant its Petition for Review and vacate those portions of the Order discussed in this Reply and Petitioners' Opening Brief.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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UNITED STATES COURT OF APPEALS
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Petitioners,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing *Reply Brief of Petitioners* was electronically filed on this 19th day of November 2018 and was served through the Court's e-filing system on this counsel of record:

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